(3)

No. 93-1504

In The

Supreme Court of the United States

October Term, 1993

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

JEFFREY W. WARREN*
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Petition For Certiorari Filed March 22, 1994
Certiorari Granted May 23, 1994

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United States District Court for the Northern District of Texas

August 17, 1987	ORIGINAL COMPLAINT and JURY DEMAND
April 17, 1989	JUDGMENT that Pltf Recover from Deft, The Celotex Corporation the following: (1) Bennie Edwards shall recover past damages in the sum of $10,195.60 with prejudgment interest at rate of 10% per annum to accrue from Sept. 21, 1986 until date of judgment and future damages in sum of $14,288.20; (2) JoAnn Edwards shall recover past damages in sum of $3,590.00 with prejudgment interest at rate of 10% per annum to accrue Sept. 21, 1986 until date of judgment and future damages in sum of $7,180.00; that Pltfs recover from Deft Celotex punitive damages in sum of $245,500.00 and their costs of action and interest on judgment at rate of 9.51% per annum as provided by law from date of judgment. (2)(cc attys)
May 31, 1989	MOTION. (Celotex re: Supersedeas bond)
June 6, 1989	ORDER . . . upon consideration of Deft The Celotex Corporation's Motion for filing of supersedeas bond, it is hereby ORDERED that the bond in the amount of

	$294,987.88 with Northbrook Property and Casualty Insurance Company be filed with the District Clerk as supersedeas of the judgment entered in this cause. Copies to all cnsl of record
June 6, 1989	SUPERSEDEAS BOND with Northbrook Property and Casualty Insurance Company are held and firmly bound unto Bennie Edwards and JoAnn Edwards in the full and just sum of $294,987.88. (3)
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May 3, 1991	MOTION FOR RELEASE OF SUPERSEDEAS BOND (Pla)
May 3, 1991	MEMORANDUM IN SUPPORT OF THE MOTION FOR RELEASE OF SUPERSEDEAS BOND
May 21, 1991	NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY MEMORANDUM IN OPPOSITION TO MOTION FOR

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February 3, 1992	JOINT STATUS REPORT (7)
May 27, 1992	ORDER . . . RE: Pla's Mtn for Release of Supersedeas Bond; Said Mtn is hereby granted; it is ORDERED that plaintiffs may execute on said bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs favor against The Celotex Corp. Copies to all parties.
June 26, 1992	NOTICE OF APPEAL . . . BY THE Celotex Corporation (Dft) from the ORDER authorizing the execution

of the supersedeas bond that was entered in this action on the 27th day of May, 1992.

United States Court of Appeals
for the Fifth Circuit

September 22, 1992	Brief for Appellant
November 17, 1992	Brief for Appellee
December 4, 1992	Reply Brief for Appellant
November 5, 1993	Opinion of the United States Court of Appeals for the Fifth Circuit-Affirmed
November 19, 1993	Petition for Rehearing
December 22, 1993	Order Denying Rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS	§	
VS.	§	CIVIL ACTION NO. 7-87-0050
THE CELOTEX CORPORATION, EL AL.	§	

MOTION FOR RELEASE OF SUPERSEDEAS BOND

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW BENNIE EDWARDS and JOANN EDWARDS, plaintiffs herein, and, pursuant to Rule 65.1 of the Federal Rules of Civil Procedure, moves the court for release of the supersedeas bond posted by Northbrook Property and Casualty Insurance Company to secure the judgment against defendant Celotex Corporation. In support thereof, plaintiffs would respectfully show the court the following:

1. On April 17, 1989, after receiving a jury verdict in plaintiffs' favor, the court entered judgment against defendant Celotex Corporation in the total amount of $281,025.80. A copy of the judgment is attached hereto as Exhibit "A."

2. On June 6, 1989, the court entered an order allowing defendant Celotex Corporation to file a supersedeas bond executed by Northbrook Property and Casualty Insurance Company in the amount of $294,987.88 in order to stay execution of the judgment pending appeal. A copy of the order allowing the filing of the supersedeas bond,

with a copy of the bond itself attached, is attached hereto as Exhibit "B."

3. The Fifth Circuit Court of Appeals issued its judgment affirming the district court's judgment against Celotex Corporation on September 20, 1990, and issued its mandate to the district court on October 12, 1990. Copies of the Fifth Circuit's judgment and mandate transmittal letter are attached hereto as Exhibits "C" and "D," respectively. Celotex did not file a petition for rehearing or move to stay the mandate.

4. On October 12, 1990, before satisfying the judgment, Celotex Corporation filed a petition for reorganization in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, Nos. 90-10016-8B1 and 90-10017-8B1. To date, Celotex has not paid the judgment entered in this case.

5. In light of Celotex's nonpayment of the judgment, plaintiff seeks to enforce the terms of the supersedeas bond executed by Northbrook Property and Casualty Insurance Company, under which Northbrook Property and Casualty Insurance Company is fully and independently liable on the judgment.

6. Rule 65.1 of the Federal Rules of Civil Procedure provides that a surety's liability "may be enforced on motion without the necessity of an independent action." Under this Rule, plaintiff is allowed to enforce Northbrook Property and Casualty Insurance Company's liability on the judgment against Celotex through this motion.

7. In further support of this motion, plaintiff would respectfully refer the court to the Memorandum of Law accompanying the motion.

WHEREFORE, PREMISES CONSIDERED, plaintiff respectfully prays for an order allowing plaintiff to collect the judgment in this case from Northbrook Property and Casualty Insurance Company, which is liable under the terms of the supersedeas bond that it executed to stay enforcement of the judgment against Celotex Corporation pending appeal.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he has conferred with Mr. Jeffrey W. Warren, bankruptcy counsel for Celotex Corporation, who advised him that Celotex Corporation will oppose this motion.

Respectfully submitted,

BARON & BUDD, P.C.
8333 Douglas Avenue
Tenth Floor
Dallas, Texas 75225
(214) 369-3605

/s/ Brent M. Rosenthal
BRENT M. ROSENTHAL

/s/ Joseph F. Bruegger
JOSEPH F. BRUEGGER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Release Supersedeas Bond was mailed on this 2nd day of MAY, 1991 to Elizabeth M. Thompson, Butler & Binion, 1500 First Interstae [sic] Bank Plaza, Houston, Texas 77002, trial counsel for Celotex; Jeffrey W. Warren, Bush, Ross, Gardner, Warren & Rudy, P.A., 220 South Franklin Street, Tampa, Florida 33602, bankruptcy counsel for Celotex; and Northbrook Property and Casualty Insurance Company, 51 West Higgins Road, South Barrington, Illinois 60010 (Attention: Surety Bond Department), the surety.

/s/ Brent M. Rosenthal
BRENT M. ROSENTHAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS, et al.,	*	
Plaintiffs,	*	
VS.	*	CIVIL ACTION
CELOTEX CORPORATION, et al.,	*	NO. CA 7-87-50
Defendants.	*	

JUDGMENT

This action came on for trial before the Court and a jury, and issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED, ADJUDGED and DECREED that the Plaintiffs recover from Defendant, the Celotex Corporation, the following sums:

1. Bennie Edwards shall recover past damages in the sum of Ten Thousand, One Hundred Ninety-Five Dollars and Sixty Cents ($10,195.60), with prejudgment interest at the rate of 10% per annum to accrue from September 21, 1986 until the date of this judgment, and future damages in the sum of Fourteen Thousand, Two Hundred Eighty-Eight Dollars and Twenty Cents ($14,288.20).

2. Joann Edwards shall recover past damages in the sum of Three Thousand, Five Hundred Ninety Dollars

PLAINTIFF'S EXHIBIT "A"

and No Cents ($3,590.00), with prejudgment interest at the rate of 10% per annum to accrue from September 21, 1986 until the date of this judgment, and future damages in the sum of Seven Thousand, One Hundred Eighty Dollars and No Cents ($7,180.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, recover from Defendant, Celotex Corporation, punitive damages in the sum of Two Hundred Forty-Five Thousand, Five Hundred Dollars and No Cents ($245,500.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, shall recover from Defendant, Celotex Corporation, their costs of this action, and interest on the judgment at the rate of 9.51% per annum as provided by law from the date of this judgment.

ENTERED this 17th day of April, 1989.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT
JUDGE

ENTERED ON DOCKET
APR 19 1989 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS, ET. AL.	§	C.A. NO. 7-87-50
VS.	§	
THE CELOTEX CORPORATION, ET. AL.	§	

ORDER

Upon consideration of Defendant The Celotex Corporation's Motion for filing of supersedeas bond, it is hereby ORDERED that the bond in the amount of $294,987.88 with Northbrook Property and Casualty Insurance Company be filed with the District Clerk as supersedeas of the judgment entered in this cause.

SIGNED this 5th day of June, 1989.

/s/ Mary Lou Robinson
JUDGE PRESIDING

PLAINTIFF'S EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS ET AL	§	
	§	CIVIL ACTION
vs.	§	NO. CA-7-87-50
CELOTEX CORPORATION	§	
ET AL	§	

KNOWN ALL MEN BY THESE PRESENTS:

That we, NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY, are held and firmly bound unto BENNIE EDWARDS AND JOANN EDWARDS in the full and just sum of TWO HUNDRED NINETY FOUR THOUSAND NINE HUNDRED EIGHTY SEVEN DOLLARS AND EIGHTY-EIGHT CENTS ($294,987.88), to be paid to the said Bennie Edwards and Joann Edwards, their heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, or assigns, jointly and severally by these presents.

WHEREAS, in a suit pending in the United States District Court for the Northern District of Texas, Wichita Falls Division, under Civil No. CA-7-87-50, between Bennie Edwards and Joann Edwards, Plaintiffs, and Celotex Corporation, Defendant, judgment was entered in favor of Bennie Edwards and Joann Edwards and against Celotex Corporation in the amount of TWO HUNDRED EIGHTY THOUSAND SEVEN HUNDRED FIFTY THREE DOLLARS AND EIGHTY CENTS ($280,753,80), and Celotex Corporation having filed an appeal to the United

States Court of Appeals for the Fifth Circuit from the entry of that judgment.

NOW, the condition of the above obligation is such that if the said Celotex Corporation shall prosecute said appeal and answer to Bennie Edwards and Joann Edwards for all damages, interest, and cost, then this obligation shall be void; otherwise it shall remain in full force and effect.

Dated: May 17, 1989

THE CELOTEX CORPORATION

By: /s/ Charles E. Robinson
Charles E. Robinson
Secretary

NORTHBROOK PROPERTY AND
CASUALTY INSURANCE COMPANY

By: /s/ Timothy J. Brady
Timothy J. Brady,
Resident Agent

By: /s/ Martin J. Mulvihill
Martin J. Mulvihill
Attorney-in-Fact

Approved this 5th day of June, 1989.

/s/ Mary Lou Robinson
UNITED STATES JUDGE

NORTHBROOK PROPERTY AND
CASUALTY INSURANCE COMPANY

(A STOCK INSURANCE COMPANY, HEREIN CALLED NORTHBROOK, OR THE COMPANY)
HOME OFFICE • NORTHBROOK, ILLINOIS

KNOW ALL MEN BY THESE PRESENTS: That Northbrook Property and Casualty Insurance Company, a corporation organized and existing under the laws of the State of Illinois, and having its principal office at Allstate Plaza, Northbrook, County of Cook, State of Illinois, does hereby appoint:

Martin J. Mulvihill

its true and lawful agents and Attorneys-in-Fact, individually, to make, execute, and sign, acknowledge, affix the Company Seal to, and deliver any and all surety bonds, consents, undertakings, and other writings obligatory in the nature of a bond, for and on behalf of said Company and as act and deed or said Company, with a limit not to exceed $5,000,000.00 any single instrument. This authority shall expire without notice at midnight of December 31, 1989, unless revoked sooner in writing. This appointment is made under and by authority of the following provision of the By-Laws of the Company which provision is now in full force and effect and is the only applicable provision of said By-Laws.

ARTICLE V. SECTION 1.

All policies of insurance issued by this Company shall comply with the laws of the respective states, territories or jurisdictions in which the policies are issued. All

bonds, undertakings, certificates of insurance, cover notes, recognizances, contracts of indemnity, endorsements, stipulations, waivers, consents of sureties, reinsurance acceptances or agreements, surety and co-surety obligations and agreements, underwriting undertakings, and all other instruments pertaining to the insurance business of the Company, shall be validly executed when signed on behalf of the Company by (1) the Chairman of the Board, (2) the President, (3) any Vice President or Assistant Vice President or (4) any other officer, employee, agent, or Attorney-in-Fact authorized in writing to so sign by the Chairman of the Board, the President, or any Vice President. All policies of insurance should bear the signature of the President and of the Secretary, which signatures may be facsimiles, and shall be countersigned by a duly licensed resident agent where so required by law or regulation. A facsimile signature of a former officer shall be of the same validity as that of an existing officer.

The affixing of the Company's Seal shall not be necessary to the valid execution of any instrument but the Secretary, any Assistant Secretary, or any officer, employee, agent, or Attorney-in-Fact authorized in writing so to do by the Secretary, any Assistant Secretary, or any Vice President, may affix the Company's Seal thereto.

This Power of Attorney is signed and sealed by facsimile under and by authority of the following Resolution voted by the Board of Directors of Northbrook Property and Casualty Insurance Company at a meeting duly called and held on the 12th day of December 1978.

BE IT RESOLVED, That the signatures of the President, the Secretary, and Vice President, or any Assistant Vice

President, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Attorneys-in-Fact for the purpose of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate so executed by and bearing such facsimile signature or signatures and facsimile seal shall be valid and binding upon the Company; and, in particular, shall be valid and binding in the future with respect to any bond or undertaking or other writing obligatory in the nature thereof to which it is attached for such purpose.

IN WITNESS WHEREOF, NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY has caused these presents to be signed by its President and its Corporate Seal to hereto affixed, on this 20th day of May, A.D., 1988.

(Seal)

STATE OF ILLINOIS
COUNTY OF COOK ss.

NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY

By /s/ Robert A. Leibold
President

I, Brenda Su Bjankini a Notary Public, do hereby certify that Robert A. Leibold personally known to be the same person who is President of the NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY a corporation of the State of Illinois, subscribed to the

foregoing instrument, appeared before me on this 20th day of May, A.D., 1988, in person and acknowledged that he being thereunto duly authorized signed, sealed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act for uses and purposes therein set forth.

"OFFICIAL SEAL"
BRENDA SU BJANKINI
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1/2/90

/s/ Brenda Su Bjankini
Notary Public

My Commission expires
January 2, 1990

CERTIFICATION

I, the undersigned President of NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY, DO HEREBY CERTIFY that the foregoing Power of Attorney is now in full force and effect.

Signed and sealed at Northbrook, Illinois this 17th day of May, A.D., 1989.

(Seal)

/s/ Robert A. Leibold
President

Bennie EDWARDS, et al.,
Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al., Defendants.

The Celotex Corporation,
Defendant-Appellant.

No. 89-1570.

United States Court of Appeals,
Fifth Circuit.

Sept. 20, 1990.

Insulator suffering from asbestosis brought action against successor to manufacturer of asbestos-containing insulation products. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., entered judgment against successor, including punitive damages, and successor appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) punitive damages were properly imposed upon successor for acts of predecessor; (2) punitive damages award of $245,500 was not excessive; and (3) punitive damages award did not violate due process clauses of Texas and Federal Constitutions and Texas Constitution's excessive fines clause, even though multiple punitive damages awards have been assessed against successor for single course of conduct.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

PLAINTIFF'S EXHIBIT "C"

Before POLITZ, JOLLY, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Celotex Corporation appeals the punitive damage award in favor of plaintiffs, Bennie and Joann Edwards, for asbestosis related to Bennie Edward's exposure to asbestos-containing products. Celotex principally contends that the district court erred in assessing punitive damages against Celotex for the acts of its predecessor, Philip Carey; the punitive damages are excessive; and the award of punitive damages violates Celotex's federal and state constitutional rights. We affirm the judgment of the district court.

I. Facts

While working for sixteen years as an insulator, Bennie Edwards was exposed to asbestos-containing insulation products manufactured by several companies, including Philip Carey Corporation, a predecessor of Celotex. He contracted asbestosis. Plaintiffs' claims necessarily assumed, and the court held, that Celotex is liable as the successor-in-interest to Philip Carey. The jury awarded the plaintiffs a total of $491,000 in actual damages. Because Celotex was found 7.18% responsible for the damages, a judgment of $35,525.80 in compensatory damages resulted. Additionally, the jury awarded the plaintiffs punitive damages of $245,500 against Celotex. Celotex argued in both a Rule 59 motion and in a Motion for Entry of Judgment that the district court should award only compensatory damages against Celotex or order a remittitur as to the amount of punitive damages.

Upon the denial of these motions, Celotex timely appealed.

II. Punitive Liability of a Successor Corporation

Celotex adroitly contends that Texas law would not impose liability for punitive damages upon it as a corporate successor to Philip Carey.[1] In part, Celotex suggests, this result follows from state corporate law principles, but also and more importantly because penalizing Celotex for the sins of Philip Carey would disserve the state's twin goals of punishment and deterrence. In two recent cases we have rejected these arguments, finding that they both depended upon evidence of Celotex's corporate history that was not in the record. *Aguirre v. Armstrong World*

[1] Celotex also maintains that there was neither any evidence that *it* was grossly negligent nor evidence that Edwards was exposed to *Celotex* products. This claim is misplaced, however, because the award of punitive damages was predicated upon the alleged acts or omissions of Philip Carey. The district court's charge to the jury instructed that "the Celotex Corporation is the successor-in-interest to Philip Carey Manufacturing Corporation and, as such, has assumed all the ordinary liabilities of Philip Carey Manufacturing Corporation." Individual jury interrogatories concerning Edwards's exposure to the defendants' products, whether the products were unreasonably dangerous, whether the products had adequate warnings, and whether the defendants were grossly negligent, each included a checklist of the defendants and identified "The Celotex Corporation (successor to Philip Carey Manufacturing Corporation)." Inasmuch as Celotex's liability was claimed to be derivative of that of Philip Carey, no proof of Celotex's actions or omissions was warranted. Celotex's "no evidence" argument represents merely another way to characterize its dispute with the derivative theory, which we address above.

Industries, Inc., 901 F.2d 1256, 1258 (5th Cir.1990); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1029 (5th Cir.1990). We reject them again here for the same reason. Celotex made no effort to seek a ruling in the trial court that would favorably characterize – under Texas or other applicable law – its acquisition of Philip Carey by means of a stock purchase of Carey's owner corporation followed immediately by an "agreement of merger."[2] Perhaps painfully aware that its efforts to avoid liability for punitive damages based on its purchase of Philip Carey have been largely unsuccessful,[3] Celotex chose to tantalize the trial court rather than to fulfill by truly joining issue, with the necessary proof, on the legal significance of its status as a successor corporation.

III. Excessiveness of Punitive Damages

Celotex alternatively seeks a remittitur of the punitive damages of $245,500 which under Texas law should be reasonably proportioned to the amount of actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex.1981). Punitive damages here total nearly seven times the actual damages apportioned against Celotex.

[2] The 1972 "agreement of merger" between Panacon Corporation (as Philip Carey's owner was then called) and Celotex was offered in evidence by *plaintiffs*, perhaps to point out that Celotex assumed Panacon's liabilities in the broadest possible terms. Otherwise, Philip Carey's rather complex corporate history is recited, though not proven, by Celotex in the introduction to a pretrial memorandum. The trial court was not asked to ferret out the implications of these transactions for purposes of considering exemplary damages.

[3] *See* cases cited in *Aguirre*, 901 F.2d at 1258.

Notwithstanding requiring reasonable proportionality, however, *Kraus* held that there can be no set rule or ratio between the amount of actual and exemplary damages which will be considered reasonable, and that each case must be analyzed according to several factors:

> (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety. *Id.*

Contrary to the Edwards's position, Texas does not require that "reasonable proportionality" be evaluated according to the total amount of actual damages rather than the proportionate share allocated against Celotex. In *John Deere Co. v. May*, 773 S.W.2d 369, 377-78 (Tex.App. – Waco 1989, writ denied), the court determined the reasonableness of a punitive damage award by measuring it against a defendant's share of actual damages. The court concluded that a $550,000 punitive damage award was not excessive compared to the co-defendant's 15% liability for actual damages of $1,050,000 ($157,500).

Although we review the proportionality of the punitive damage award against Celotex in comparison with its allocated share of actual damages, however, we do not find it so excessive as to suggest that passion rather than reason motivated the jury. *Wright v. Gifford Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex.1987) (quoting *Tynberg v. Cohen*, 76 Tex. 409, 416, 13 S.W. 315, 316 (1890)). The conduct of Philip Carey in marketing its asbestos products, as reported at trial, could support an award of gross negligence. Celotex contests neither the jury finding nor

the other *Kraus* factors bearing on the size of the punitive damage award. Moreover, the award in this case is not grossly disproportionate to other punitive damage awards under Texas law.[4] *See, e.g., King, supra* (punitive damages – $1,550,000; actual damages about $1 million); *Aguirre, supra* (punitive damages $201,000; actual damages $658,000); *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 912 (Tex.App. – Corpus Christi 1989), *writ granted*, (1990) ($2.2 million punitive damages; actual damages $495,000); *Donnel v. Lara*, 703 S.W.2d 257, 261-62 (Tex.App. – San Antonio 1985, writ ref'd n.r.e.) ($4,500 punitive damage award not excessive where jury awarded two dollars ($2.00) as actual damages for harassing phone calls); *Russell v. Truitt*, 554 S.W.2d 948, 956 (Tex.Civ.App. – Fort Worth 1977, writ ref'd n.r.e.) ($55,000 punitive damage award not excessive as compared to $8,000 in actual damages).

IV. Constitutional Limitations

Celotex finally repeats its arguments that multiple punitive damage awards for a single course of conduct violate the due process clauses of the Texas and federal constitutions and the Texas constitution's excessive fines clause, Art. I § 13. This court resolved such arguments against Celotex in *King, supra*, and there is no controlling difference between the two cases. That Celotex did not

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[4] Texas recently enacted a statutory cap on punitive damage awards, generally limiting them to four times actual damages or $200,000, whichever is greater. Tex.Civ.Prac. & Rem.Code Ann. §§ 41.001-008 (Vernon Supp.1988). The cap does not apply in this case.

challenge the disproportionality of the *King* punitive damage award, but does so challenge the instant award, does not affect the application of *King* for several reasons. First, we have reviewed the award in accord with Texas legal principles and found it substantiated. Celotex has not asserted that federal procedural due process limits are transgressed by the application of Texas punitive damage law in an individual case. Second, we do not perceive the punitive damage award here as being so individually outrageous as to shock the judicial conscience even though it has survived scrutiny under state law. *See Browning-Ferris Indus. v. Kelco Disposal Co., Inc.*, ___ U.S. ___, 109 S.Ct. 2909, 2923, 106 L.Ed.2d 219 (1989) (Brennan and Marshall, JJ., concurring). Third, a challenge of excessiveness as to an individual punitive damage award does not reach the broader issue of the propriety of serial punitive damage awards in mass tort litigation.

As for Celotex's pleas for relief from the onslaught of serial punitive damage awards, we can only echo *King's* "misgivings" that no due process or legislative remedy is available in this circuit. 906 F.2d at 1033. *Compare Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.1990), *petition for cert. filed*, No. 90-121 (July 16, 1990) (outlining possible theories of due process violation). Celotex supplemented its post-trial motions in this case with affidavits reflecting that between September, 1988 and March, 1989, judgments for punitive damages exceeding $10 million were entered against it, compared with $15 million in adverse actual damage judgments. If no change occurs in our tort or constitutional law, the time will arrive when Celotex's liability for punitive damages

imperils its ability to pay compensatory claims and its corporate existence. Neither the company's innocent shareholders, employees and creditors, nor future asbestos claimants will benefit from this death by attrition.

With our own misgivings, we AFFIRM.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6314
600 CAMP STREET
NEW ORLEANS,
LA. 70130

October 12, 1990

Mrs. Nancy Hall Doherty, Clerk
U. S. District Court
1000 Lamar, Room 203
Wichita Falls, TX 76307

No. 89-1570 – Edwards vs. Armstrong
(D.C #CA 7 87 50)

X Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

_ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

_ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

_ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

PLAINTIFF'S EXHIBIT "D"

_ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

X Copy of the Court's opinion.

X Original record on appeal or review. 9 Volumes

X Other original papers forwarded with record.

___Envelope 1 Box

_ Bill of Costs approved by this Court. _ Copy enclosed to counsel.

Sincere

GILBERT F. GANUCHEAU, Clerk

By: /s/ Jean Anderson
Deputy Clerk

cc: (Letter Only)
Judge Mary Lou Robinson
Ms. Elizabeth M. Thompson
Mr. Brent M. Rosenthal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS	)	CIVIL ACTION NO. 7-87-0050
vs.	)	
CELOTEX CORPORATION, ET AL.	)	

NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY MEMORANDUM IN OPPOSITION TO MOTION FOR RELEASE OF SUPERSEDEAS BOND

Northbrook Property and Casualty Insurance Company ("Northbrook") – the issuer of the supersedeas bond in question – opposes plaintiffs' motion for release of the supersedeas bond. Not only is that motion stayed by the Celotex bankruptcy, but the supersedeas bond matter is *sub judice* in the bankruptcy court.

I. Introduction

The instant case is one of approximately 100 asbestos-related cases against Celotex in which a supersedeas bond was posted by or at the instance of one of Celotex's liability insurers. The bond here, as in other cases, is secured by the proceeds of Celotex's insurance policies.

Northbrook posted the instant bond pursuant to a settlement agreement which provides that the insurer pay

specified amounts on specific dates to satisfy a disputed insurance coverage obligation. The settlement agreement insurance proceeds are restricted for use only in the defense and indemnity of asbestos-related claims. Any payment the insurer makes on the supersedeas bonds, moreover, has the effect of reducing by an equal or greater amount the insurance payments the insurer must make to debtors under the settlement agreement.

Celotex is in bankruptcy. The status of the supersedeas bonds as property of the debtors' estates raises complex bankruptcy questions, arguably of first impression.[1] The Tampa, Florida bankruptcy court – where the reorganization case pends – has requested that interested parties submit memoranda as to whether the supersedeas bonds constitute "property of the estate" or, alternatively, whether a debtor in Chapter 11 has a protectable interest in such bonds. The matter has been fully briefed in the bankruptcy court. Indeed, plaintiffs' counsel here submitted a memorandum to the bankruptcy court (Exhibit A hereto) and debtors' counsel has submitted a memorandum and a supplemental memorandum on the issue.[2]

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[1] On October 12, 1990, Celotex Corporation ("Celotex") and its wholly owned subsidiary, Carey Canada Inc., filed petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, Consolidated Case Numbers 90-10016-8B1 and 90-10017-8B1.

[2] The facts set forth in this introduction are more fully explicated in the supplemental memorandum of debtors regarding status of supersedeas bonds, filed in the bankruptcy court last March. A copy is attached hereto as Exhibit B.

II. Plaintiffs' Motion for Release of Bond is Stayed.

A. The October 17, 1990 Stay Order Enjoins Plaintiffs' Motion.

Plaintiff's Motion is barred by the special Stay Order the bankruptcy court issued on October 17, 1990. That Order, issued pursuant to Section 105 of the Bankruptcy Code, enjoined all persons "from commencing or continuing any judicial administrative or other proceeding involving any of the Debtors . . . " (Exhibit C, ¶ 3.) The Order applies, moreover, regardless of whether "a supersedeas bond has been posted . . . " (*Id.*) The idea is to stop all actions which have to do with the debtors and to require, *inter alia*, that all questions pertaining to the supersedeas bonds be heard in the bankruptcy court.

The bankruptcy court has jurisdiction to determine whether an asset, such as the Northbrook supersedeas bond, constitutes property of the debtors' estates, and it has the power – which it has exercised here – to enjoin actions in all other forums which encroach upon this jurisdiction. *In re Neuman*, 71 B.R. 567 (S.D.N.Y. 1987).

In *Neuman*, the debtor sought to prosecute a pending state court action to determine whether a state health operating certificate is property of the estate and was enjoined by the bankruptcy court from "commencing or continuing in a forum other than this Bankruptcy Court . . . anything which requires, either directly or indirectly, a finding as to what is property of the estate. . . . " 71 B.R. at 570. The district court affirmed the bankruptcy court's authority to enjoin the state court action holding:

> Even though the Bankruptcy Court may enjoin the state court action on the grounds that it interferes with the reorganization proceedings, the court also has the power to issue an injunction on the grounds that the Bankruptcy Court, rather than another court, should be the forum to decide whether an asset is property of the estate.

Id. at 573.

B. The Section 362(a)(2)-(4) Stay Applies.

The Bankruptcy Code automatically stays actions against property of the estate. 11 U.S.C. § 362(a)(2)-(4). Under the agreements between debtors and their liability insurers, payment of a bond by an insurer has precisely the same effect as a payment on a liability policy.

An action against a supersedeas bond that diminishes the estate's assets is subject to the automatic stay. *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir. 1990). Insurance policy proceeds are property of the estate, and the courts routinely bar individual plaintiff's actions that would diminish the amount of insurance proceeds available to the estate for equitable distribution to all tort claimants. *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93-94 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).

Even more importantly, it is the bankruptcy court that should determine whether § 362 of the Bankruptcy Code stays an attempt to execute on a supersedeas bond. *In re Chateaugay Corp.*, 93 B.R. 26, 28 (S.D.N.Y. 1988) ("[C]entralization of the determination of the scope of the

automatic stay was vital to the scheme of the reorganization process"); *In re Baldwin-United Corp.*, 765 F.2d 343, 345, 348-49 (2d Cir. 1985) ("We conclude that the Bankruptcy Court is entitled to determine the applicability of its stay and, under the circumstances of this case should be permitted to do so").

C. The Automatic Stay under Section 362(a)(1) Applies.

Section 362(a)(1) automatically stays "the continuation . . . of a judicial . . . action or proceeding against the debtor. . . . " The instant action is a suit against Celotex, not the third-party supersedeas bonding company.

Moreover, the appeal process is not over. On the day debtors filed their bankruptcy petitions, October 12, 1990, the time for applying to the Supreme Court for writ of certiorari in the instant matter had not run. The Fifth Circuit issued its affirmance herein on September 20, 1990. Under Supreme Court Rule 13, Celotex had 90 days therefrom to seek Supreme Court review. Pursuant to Bankruptcy Code Section 108(c), debtors now have until 30 days after the bankruptcy court grants relief from the stay to so apply. As long as prosecution of the appeal is stayed, the bond cannot be executed upon.

D. The Automatic Stay Under Section 362(a)(6) Applies.

The Section 362(a)(6) automatic stay prohibits "any act to collect, access or recover a claim against the debtor that arose before the commencement of the case under

this title." Plaintiffs' motion seeks to collect on the judgment against Celotex. The filing of a supersedeas bond does not create an exception to the automatic stay. *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir. 1990). Absent relief from the stay, plaintiffs are barred from collecting on the judgment.

CONCLUSION

Northbrook's interest here is in the orderly administration of justice. The status of the bonds is *sub judice* in the bankruptcy court that is supervising the entire Celotex reorganization. Northbrook has a vital interest in not being subjected to conflicting court decisions concerning the supersedeas bonds. It also has an interest in the status of the bonds being decided economically, efficiently and expeditiously.

For the reasons stated, Plaintiffs' Motion for Release of Supersedeas Bond should be denied.

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: Chapter 11

THE CELOTEX CORPORATION, et al., Consolidated Case Nos. 90-10016-BKC-8B1 and 90-10017-BKC-8B1

Debtors.
_____/

MEMORANDUM OF COUNSEL FOR ASBESTOS-RELATED PERSONAL INJURY CREDITORS REGARDING THE STATUS OF SUPERSEDEAS BONDS

I. INTRODUCTION

On October 12, 1990, after more than two years of engaging in a "scorched-earth" approach to resolving the numerous asbestos personal injury and wrongful death claims against it, debtor the Celotex Corporation ("Celotex") filed for protection under the United States Bankruptcy Code. During the two-year period in which Celotex had refused to offer more than nuisance value in any asbestos injury case against it, more than 100 verdicts were returned against the company, totaling, by Celotex's own calculation, almost $70 million dollars. Celotex appealed the overwhelming majority of the verdicts against it, without any apparent regard for the merits of the arguments that it would assert in its appeals. Celotex's purpose in employing this hard-line litigation strategy was obvious and undeniable, if unspoken – to delay the payment of its tort obligations, whatever the ultimate cost.

EXHIBIT A

By delaying payment of asbestos health claims through exhausting all litigation options, Celotex stood to benefit in a variety of ways. Delay of payment, of course, was an end in itself. Additionally, by clogging the trial and appellate courts with cases that in the past had routinely settled, Celotex hoped to stimulate a judicial adjustment for legislative overhaul of the tort system that would reduce Celotex's liability. Celotex had nothing to lose by engaging in this approach; if its strategy of taking virtually all cases to trial proved disastrous, and its effort to obtain judicial or legislative relief proved unsuccessful, it could still delay paying the verdicts returned against it by seeking bankruptcy protection. Moreover, it could even urge the bankruptcy court to reduce the jury awards that it owed to plaintiffs, and actually to eliminate certain types of awards.[1]

Under federal law and the law of virtually every state, in order to delay enforcement of any of the verdicts against it pending appeal, Celotex was required to post a supersedeas bond in the amount of the judgment plus anticipated interest. The generally-understood and common-sense reason that the law requires the posting of a

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[1] None of these goals, of course, have any legal or moral legitimacy. While Celotex was entitled to advocate a change in our constitutionally-mandated system of resolving disputes, it was not entitled to do so while addressing individual claims in bad faith, purely for purposes of delay. Celotex's argument that supersedeas bonds are subject to discharge in bankruptcy is premised on the assumption that the bankruptcy court will reduce the amounts owed by Celotex in judgments to asbestos injury creditors. Celotex's position on the supersedeas bond issue is simply a continuation of its effort to avoid, in bad faith, the valid claims of persons maimed or killed by its products.

supersedeas bond to stay enforcement of a judgment pending disposition of an appeal is protect the judgment creditor from any harm caused by delay in enforcing the judgment. The elemental type of harm that could result to a judgment creditor from delay in enforcing a judgment – the judgment debtor's declaration of insolvency after the judgment is entered but before it is affirmed and paid – is precisely the harm caused to numerous asbestos injury plaintiffs by the instant bankruptcy proceeding. Yet Celotex takes the position that supersedeas bonds, which were posted on its behalf for the protection of judgment creditors under various state and federal laws, actually afford judgment creditors no protection at all. Celotex argues that the posting of a supersedeas bond is essentially a meaningless act, a formality that affords no protection to parties with valid, enforceable judgments.

But Celotex is wrong. A plethroa [sic] of decisions, both from bankruptcy courts and from courts of general jurisdiction, apply the common-sense notion that supersedeas bonds are independent obligations of third parties, and are neither property of the debtor's estate nor are property over which a bankruptcy court can exercise any jurisdiction. In opposing this overwhelming weight of authority, Celotex is unable to cite a single decision from any court in any era holding that the bankruptcy of the judgment debtor prevents the judgment creditor from obtaining full satisfaction of the judgment out of the proceeds of the supersedeas bond. The unanimity of authority, if not logic and visceral notions of fairness, compels the conclusion that supersedeas bonds posted on Celotex's behalf to stay enforcement of judgments are not

assets of Celotex, and are not subject to this court's jurisdiction or control.

II. ARGUMENT

A. The Courts That Have Considered This Issue Have Unanimously Concluded That Supersedeas Bonds Are Not Property of the Estate in Bankruptcy, Are Not Subject to the Control of the Bankruptcy Court, and May Not Be Distributed to Other Creditors in a Bankruptcy Proceeding.

As Celotex concedes in its Memorandum Regarding the Status of Supersedeas Bonds at 9, the cases adhering to the principle that a supersedeas bond posted on behalf of debtor to stay enforcement of a judgment is not property of the debtor subject to distribution under the Bankruptcy Code are "legion."[2] The seminal case applying this reasoning, as Celotex correctly points out, is *Mid-Jersey Nat'l Bank v. Fidelity Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975). In that case, the Third Circuit held that a certificate of deposit filed in lieu of a supersedeas bond

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[2] *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222 (10th Cir. 1987); *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975); *Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172 (D.Colo. 1987); *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376 (Bankr. N.D.Ohio 1983); *W. W. Gay Mechanical Contractor, Inc. v. Wharfside Two*, 545 So.2d 1348 (Fla. 1989), all cited by Celotex in its Memorandum; *see also J. M. Beeson Co. v. Sartori*, 553 So.2d 180 (Fla. 4th DCA 1989); *Carter Real Estate and Development, Inc. v. Builder's Service Co.*, 718 S.W.2d 828, 829 (Tex.App. 1988); *Atlantic Richfield Co. v. Good Hope Refineries*, 604 F.2d 865 (5th Cir. 1979); *Saper v. West*, 263 F.2d 422 (2d Cir. 1959), which were not cited by Celotex but applied the same reasoning as the cases cited above.

with the clerk of the court was not property of the estate over which the bankruptcy court had jurisdiction. The Third Circuit concluded that

> in the context of this case, such a deposit in court is not the property of the debtor and is not subject to the after-arising jurisdiction of the Chapter XI court. . . . Although the legal status of a deposit in court pending an appeal is not entirely pellucid, we are of the opinion that such a deposit *in custodia legis* may be considered the res of a trust. The court acts as trustee and is charged with the duty of determining the beneficiaries pursuant to the appeal.

518 F.2d at 643.

More recently, in *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222 (10th Cir. 1987), the Tenth Circuit ruled that the FDIC was not entitled to the return of supersedeas bonds posted by a bank to stay execution of a judgment prior to the bank's insolvency. The FDIC argued that, as a government agency, it was not required to post bonds to secure judgments, and claimed that the supersedeas bonds should be returned to the estate of the insolvent bank and distributed to creditors. 833 F.2d at 224. The court declined to release the bonds, observing that "[e]xonerating these bonds would undermine the rationale for requiring a bond pending appeal, which is to secure the judgment throughout the appeal process against the possibility of the judgment debtor's insolvency." *Id.* at 226. The court cited *Mid-Jersey* for the proposition that the bond was no longer an asset of the insolvent bank available for ratable distribution to creditors. *Id.*

Both the Second and Fifth Circuits have also applied the reasoning set forth in *Mid-Jersey* and *Grubb* In holding that judgment creditors are entitled to satisfy their claims against bankrupt defendants out of the proceeds of supersedeas bonds securing the judgments, because such bonds are not the property of the debtor and may not be included in the bankrupt's estate. *See Saper v. West*, 263 F.2d 422 (2d Cir. 1959) (funds deposited by a debtor with the clerk of the court to secure payment of a judgment pending resolution of appeal were no longer property of the debtor, and were not recoverable by trustee in bankruptcy two years later as a preference); *Atlantic Richfield Co. v. Good Hope Refineries*, 604 F.2d 865 (5th Cir. 1979) (admiralty case against defendant in Chapter XI proceedings may go forward against the debtor who posted a bond prior to filing bankruptcy, since the action would proceed against the bond, which was not property of the bankrupt's estate). Moreover, federal district courts, federal bankruptcy courts, and state appellate courts have, without exception, followed the *Mid-Jersey* holding. *See, e.g., Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172, 174 (D.Colo. 1987) (holding that funds deposited in lieu of a supersedeas bond "are not an asset or property of National's bankruptcy estate, and any contingent reversionary interests National had in the funds terminated on June 1, 1987, when the Tenth Circuit Court of Appeals affirmed this court's judgment against National"); *W. W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1350 (Fla. 1989) ("We find that the supersedeas bond posted by Wharfside and Chanen is not property of the estate and will not be used to find that

plan for reoroganization"); *Carter Real Estate and Development, Inc. v. Builder's Service Co.*, 718 S.W. 828, 829 Tex.App. 1986) (finding support for its holding that the supersedeas bond was not the property of the bankruptcy estate 11 U.S.C. § 534(e), which provides that "discharge of the debt of the debtor does not affect the liability of any other entity on, or the property of another entity for, such debt"). At least one federal district court has already ruled that a supersedeas bond posted by an insurance company on behalf of Celotex to stay execution of a judgment against Celotex pending appeal is not part of Celotex's estate and is not subject to the control of the bankruptcy court. *Willis vs. Celotex Corp.*, No. 87-645-N (E.D.Va. Jan. 2, 1991) (a copy of which is attached hereto).

In response to this avalanche of authority, Celotex is unable to cite a single case on point. It is forced to rely on *Sheldon v. Munsford, Inc.*, 902 F.2d 7 (7th Cir. 1990) and Judge Moore's dissent in *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d at 227-30, to support its position that supersedeas bonds are the property of its estate in bankruptcy. The *Sheldon* case is inapposite; Judge Moore's dissent is unpersuasive and stands alone.

In *Sheldon* the court held that an appeal by a judgment debtor that filed a bankruptcy petition was automatically stayed under 11 U.S.C. § 362(a) even though a supersedeas bond secured the judgment. The court did not base its decision on a belief that the supersedeas bond was ultimately the property of the debtor – indeed the court observed that "the probability is [close to] 100 percent . . . that INA [the surety] will pay the judgment if we affirm." 902 F.2d at 8. Instead, the court based its decision on its recognition that the debtor was potentially

at least theoretically liable for the judgment, that the debtor stood to benefit from a favorable disposition of the appeal, and that the appellate process itself would affect the debtor. *Id.* In acknowledging that the surety would almost certainly pay the judgment if it were affirmed, and in suggesting that the bankruptcy court would lift the automatic stay "as soon as it is satisfied that [the debtor] is adequately represented in this court," *Id.* at 9, the court's assumption that the supersedeas bond was fully available to satisfy the judgment agains [sic] the debtor without restriction by the bankruptcy court was clearly intimated, if not explicitly stated, throughout the opinion.

Dissenting in *Grubb*, Judge Moore argued that the certificates of deposit tendered to the court to obtain a stay of execution in that case secured not the judgment itself, but the promise to pay the judgment. 833 F.2d at 227 (Moore, J., dissenting). Judge Moore never adequately explained, however, why this distinction should lead to a result different from that reached by the majority; either the judgment or the promise to pay the judgment was secured by the bonds deposited with the court. The majority noted that Judge Moore's approach was undesirable not only because it would deny judgment creditors the protection that they reasonably expect, but also because it would eventually prejudice judgment debtors by virtually requiring the premature enforcement of judgments.

> Under the result advocated in the dissent, a supersedeas bond posted by a financially troubled national bank provides no protection for the judgment creditor. If the dissent's position were the rule, trial courts would not grant stays of execution to potentially insolvent national banks, because any supersedeas bond posted by such a bank would not serve the purpose for which these bonds are intended. Instead, the banks would be forced to pay trial court judgments immediately, possibly driving them further toward insolvency.

833 F.2d at 227 n.3.

Fortunately, Judge Moore's reasoning did not carry the day in *Grubb*. His dissenting opinion remains the only arguable[3] judicial expression of the position that Celotex advocates in the instant proceeding.

Lacking any persuasive support in the decisional law, Celotex is forced to argue that the recent cases holding that supersedeas bonds may not be considered property of the bankruptcy estate are simply wrong. The landmark *Mid-Jersey* case, Celotex explains, was decided before the enactment of the Bankruptcy Code in 1978. The law applicable when *Mid-Jersey* was decided confined the bankruptcy estate to property actually in the debtor's possession; since the bond at issue in the *Mid-Jersey* case

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[3] The reasoning of the dissent in *Grubb* also appears to hinge on the fact that the debtor secured the judgment (or the promise to pay the judgment) with its own certificates of deposit, rather than with a surety agreement executed by a third party. Had the bond itself simply been an agreement by an unrelated third party to pay the judgment in the event of default, Judge Moore might well have joined the majority. In any event, a bond deposited with the court to secure the obligation to pay a judgment should be not considered the property of the judgment debtor, whether the bond takes the form of a surety agreement or is a negotiable instrument or cash pledged by the debtor itself.

was not in the debtor's possession, the *Mid-Jersey* case may have been correctly decided under the applicable law, Celotex says. But the Bankruptcy Code expanded the concept of the debtor's estate to include all property in which the debtor has an interest, including property possessed by third parties. Celotex Memorandum at 5-6, citing 11 U.S.C. §541; Celotex Memorandum at 9-10. Thus, Celotex argues, the rationale of *Mid-Jersey* no longer applies. The reliance of post-Code cases on *Mid-Jersey* is misplaced, and, Celotex contends, those cases should not be followed.

At least one court has expressly rejected Celotex's argument that the *Mid-Jersey* reasoning did not survive the enactment of the Bankruptcy Code. *W. W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1350 (Fla. 1989). More importantly, Celotex's analysis does not withstand scrutiny, because it is based on the inaccurate premise that the *Mid-Jersey* decision was based exclusively on the debtor's lack of possession. A fair reading of *Mid-Jersey* reveals that the decision was based on the court's recognition that the debtor lacked *any* interest in the bond once the appeal was decided and the judgment affirmed.

> Once we have determined that FMI [the debtor] does have an interest in the trust fund, the Chapter XI court would, of course, have jurisdiction over any funds to which the debtor has a rightful claim. At present, however, the Court is able to proceed with determining which party is entitled to receive the trust res and its accumulated interest.

Mid-Jersey, 518 F.2d at 644.

Similarly, in the instant case, as in all the post-Code cases upon which the asbestos personal injury creditors rely. Celotex's "contingent reversionary interest" in the supersedeas bonds is not enough to allow the court to place the supersedeas bonds into the bankruptcy estate. The Court is properly allowing appeals involving Celotex to proceed upon motion, thus allowing Celotex's liabilities to be decided. Once an appeal is concluded, there is no more "contingency;" either Celotex has a right to the return of its bond or it does not. Celotex simply has no property interest in supersedeas bonds or cash deposits that secure judgments which have been affirmed on appeal or are otherwise final.

The asbestos personal injury creditors have shown that the courts have been unanimous in holding that supersedeas bonds or cash deposits are independent obligations and they cannot be considered "property of the debtor" subject to distribution in bankruptcy. The following discussion will illustrate that Celotex has shown the court no legitimate reason to ignore these decisions based upon the peculiar facts involved in this bankruptcy.

B. The Reasons Asserted by Celotex for Holding the Supersedeas Bonds To Be Property of Its Bankruptcy Estate Are Without Merit.

Celotex analogizes the supersedeas bonds posted to secure individual judgments against Celotex to liability insurance generally available to the debtor to satisfy claims against it. It cites several cases supporting the proposition that liability insurance is an asset of the bankruptcy estate, and concludes that supersedeas bonds

may be similarly distributed through a bankruptcy proceeding.

But a supersedeas bonds are not the same as general liability insurance. Most obviously, a supersedeas bond is a precise, liquidated amount deposited in court for the benefit of a particular, identified claimant. In contrast, insurance is available to the insured to satisfy the claims of a class of individuals. More importantly, the judgment creditor is the direct and sole beneficiary of the bond; unlike insurance, the bond is intended to protect the judgment creditor, not the debtor. The successful plaintiff whose judgment has been stayed by the posting of a supersedeas bond is entitled by law or by the rules of court to the protection of such a bond; in contrast, no potential plaintiff is automatically entitled to the protection of insurance coverage owned by the tortfeasor. Finally, if the plaintiff whose judgment has been secured by a supersedeas bond prevails on the underlying claim, release of the bond to the plaintiff is direct and ministerial. See, e.g., Fed.R.Civ.P. 65.1. In contrast, a successful plaintiff's access to insurance proceeds generally is controlled by the insured.

A supersedeas bond, then, is a more specific type of obligation, and provides the judgment creditor with more particularized and direct relief, than general liability insurance. The insurance cases upon which Celotex relies to show that supersedeas bonds are included in the bankruptcy estate are inapposite. Far more relevant are the cases describing the character of supersedeas bonds, which, as described earlier, all hold that supersedeas bonds are not subject to the control of the bankruptcy court.

Celotex then argues that because it obtained the supersedeas bonds by pledging collateral[4] with the companies that issued the bonds, Celotex is directly affected by release of the bonds to judgment creditors and therefore has a property interest in the bonds. But the asbestos personal injury creditors vigorously dispute the assertion that Celotex is affected even indirectly by permitting judgment creditors to satisfy their claims out of the proceeds of supersedeas bonds. Celotex is affected only if the companies that issued the bonds retain the collateral pledged by Celotex to obtain them. In other words, by allowing judgment creditors to recover on the supersedeas bonds, the court is not allowing the depletion of Celotex's estate; Celotex's estate would be depleted only if the bonding companies refused to return to Celotex the collateral pledged by Celotex to obtain the bonds.

Celotex argues generally that the bonds posted on its behalf may be voidable as preferences or even as fraudulent conveyances. Such determinations, of course, must be made on a case-by-case basis. Typically, it is the creditors rather than the debtor itself that seek to void a transfer as a fraudulent conveyence [sic]; Celotex's suggestion that it was guilty of some type of fraud in permitting a judgment to be entered against it and in bonding

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[4] Celotex notes that this collateral generally took the form of cash or advances on insurance proceeds. Of course, the nature of the collateral, and even the substance of the agreement between Celotex and the surety as a whole, is irrelevant. What *is* relevant is that Celotex pledged the collateral to the surety, not to the judgment creditors. Celotex's efforts to recover or assert an interest in the collateral should be directed to the surety, not to the judgment creditors.

the judgment is nothing short of astonishing. Celotex cites no examples of bonds that it obtained as a result of fraud, and the asbestos health creditors suggest that the finding of a fraudulent conveyence [sic] does not provide a likely basis for invalidating any of the supersedeas bonds or the judgments upon which the bonds were based.

Finally, Celotex obliquely suggests that to the extent that a supersedeas bond represents liability for punitive damages, it should not be paid to the judgment creditor but should be returned to the estate to satisfy other creditors' claims for compensatory damages. Whether or not a bankruptcy court has the power to discharge claims for punitive damages in a plan of reorganization, it does not have the authority to attach property not within its jurisdiction and use it to satisfy claims against the debtor. As plaintiffs have made clear the supersedeas bonds are not a part of Celotex's estate and therefore cannot be used to fund a plan of reorganization. A judgment creditor's rights against the bonding company that insured the judgment are governed by the bond agreement and by the law governing such agreements, and not by the nature of the underlying judgment. Such rights are independently enforceable, and a bankruptcy court cannot impair them.

III. CONCLUSION

Celotex's desire to recover as much of its property as possible, so as to maximize the assets available to satisfy the claims of all its creditors, is praiseworthy. However, the private property rights of judgment creditors, many

of whom have experienced disabling physical injuries or the death of a spouse or parent as a result of Celotex's tortious conduct, and all of whom were forced to trial by Celotex's refusal to negotiate in good faith, must be respected. Celotex cannot take property that it does not own and use it to satisfy the claims against it. The bonds posted to secure and stay judgments against Celotex simply are not Celotex's property, and cannot be used to fund Celotex's plan of reorganization.

The very purpose of a supersedeas bond is to protect the judgment creditor from the possibility that the judgment debtor will become insolvent during the appeal and become unable to pay the judgment. Adoption of Celotex's position would frustate [sic] this purpose, and would conflict with every reported decision on the issue.

Fairness to judgment creditors, a common-sense recognition of the purpose of supersedeas bonds, and the overwhelming weight of authority compel the court to conclude that the supersedeas bonds posted in order to stay execution of judgments against Celotex are not part of Celotex's bankruptcy estate. This court should therefore rule that judgment creditors of Celotex may satisfy their judgments by executing on supersedeas bonds posted on behalf of Celotex when the judgments become final.

Respectfully submitted,

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/s/ Brent M. Rosenthal
BRENT M. ROSENTHAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS AND JOANN EDWARDS, Plaintiffs,	§	
VS.	§	C. A. No. 7-87-0050
THE CELOTEX CORPORATION, ET AL., Defendants.	§	

SUPPLEMENTAL RESPONSE IN OPPOSITION TO MOTION FOR RELEASE OF SUPERSEDEAS BOND

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendant THE CELOTEX CORPORATION ("Celotex") supplements its Response in Opposition to Motion for Release of Supersedeas Bond to make this Court aware of a decision of the United States Bankruptcy Court for the Middle District of Florida entered on June 13, 1991.

On that date, the Honorable Thomas E. Baynes, Jr., entered an Omnibus Order on Motion to Lift Stay with Regard to Celotex Appeals and Supersedeas Bonds Thereon (the "Omnibus Order"). In the Omnibus Order, Judge Baynes held that any supersedeas bond which is in place to stay execution of a judgment against Celotex remains property of the Celotex bankruptcy estate as long

as the appellate process upon which it is based is proceeding, and that "the automatic stay of Section 362 applied to any action to enforce a judgment against the supersedeas bond." Judge Baynes also held that even after the appellate process is concluded, the judgment creditor is precluded from proceeding against any supersedeas bond without first seeking to vacate Judge Baynes' order enjoining judgment creditors from proceeding against supersedeas bonds pursuant to 11 U.S.C. § 105. (This § 105 order has been presented to the Court as part of Celotex's original response to the present motion.) A true and correct copy of the Omnibus Order is attached hereto as Exhibit A.

Plaintiffs' counsel in this case, the firm of Baron & Budd, P.C., appeared in the proceeding which lead to the entry of the Omnibus Order as one of the counsel for the Asbestos-Related Personal Injury Creditors. As such, the Omnibus Order is binding upon Plaintiffs in this action.

Plaintiffs' Motion for Release of Supersedeas Bond therefore is a violation of both 11 U.S.C. § 362 and of the bankruptcy court's January 10, 1991, order entered under 11 U.S.C. § 105. Any doubt that these violations are occurring has been resolved by the entry of the Omnibus Order. The only action which should be taken at this point which would not be a further violation of the bankruptcy court orders and the automatic stay would be

for this Court to overrule the Motion for Release of Supersedeas Bond.

Respectfully submitted,

BUSH ROSS GARDNER
WARREN & RUDY, P.A.
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General Bankruptcy Counsel
for the Debtors

By: /s/ Jeffrey W. Warren,
by/Illegible
Jeffrey W. Warren

BUTLER & BINION
1600 First Interstate Bank Plaza
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(713) 237-3296
Special Counsel for the Debtors

By: /s/ Elizabeth M. Thompson
by/Illegible
Elizabeth M. Thompson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record:

Mr. Brent M. Rosenthal
Baron & Budd, P.C.
8333 Douglas Ave., 10th Floor
Dallas, Texas 75225

Northbrook Property and
Casualty Insurance Company
51 W. Higgins Rd.
South Barrington, Illinois 60010
Attn: Surety Bond Dept.

by certified mail, return receipt requested, on this 25th day of July, 1991.

/s/ Elizabeth M. Thompson
by/Illegible
Elizabeth M. Thompson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS	§	
Plaintiffs,	§	CIVIL ACTION
vs.	§	NO. CA7-87-050-K
EMPIRE ACE INSULATION MFG. CORP., ET AL.,	§	
Defendants.	§	

JOINT STATUS REPORT

COME NOW Plaintiffs, Defendant Celotex Corporation, the only defendant remaining in this case, and Northbrook Property and Casualty Insurance Co., the surety on the supersedeas bond posted by Defendant Celotex Corporation, and submit their Joint Status Report in accordance with this Court's order of January 14, 1992. The parties respond to the Court's inquiries as follows:

(1) A brief statement of the nature of the case, including the contentions of the parties;

This case was settled between plaintiffs and all defendants except Celotex Corporation ("Celotex"). The case was tried to a jury in April of 1989. On April 17, 1989, upon the jury's verdict, the court entered judgment in plaintiffs' favor and against Celotex in the amount of $280,753.80. Upon Celotex's request, Northbrook Property and Casualty Company ("Northbrook"), as surety, joined Celotex in issuing a supersedeas bond in the amount of $294,097.88

to stay execution of the judgment pending appeal. Celotex appealed the judgment to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment in a reported opinion. *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151 (5th Cir. 1990). Celotex did not file a petition for rehearing, and the Fifth Circuit issued its mandate of affirmance to this court on October 12, 1990. On the same date, Celotex filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. On October 17, 1990, in response to an emergency motion filed by Celotex, the bankruptcy court entered an order pursuant to §105 of the bankruptcy code enjoining all entities "from commencing or continuing any judicial, administrative or other proceeding involving the Debtors, regardless of who initiated the proceeding, whether the matter is on appeal and a supersedeas bond had been posted by the Debtors, or, the appellant in the appeal was one of the Debtors."

On or about May 3, 1991, plaintiffs filed a motion in this case under Rule 65.1 of the Federal Rules of Civil Procedure, seeking leave of court to enforce the terms of the supersedeas bond posted on behalf of Celotex by Northbrook. Northbrook filed a memorandum in opposition to the motion on or about May 21, 1991, and Celotex filed a response in opposition to the motion on or about May 22, 1991. Celotex and Northbrook took the position that plaintiffs' effort to enforce the supersedeas bond is a preceeding [sic] against the debtor in bankruptcy and against the property of the bankruptcy

estate that the bankruptcy court has the power to enjoin, and that the bankruptcy has enjoined the type of motion asserted by plaintiffs in this case by its order dated October 17, 1990. On June 13, 1991, the bankruptcy court entered its Omnibus Order on Motion To Lift Stay with Regard to Celotex Appeals and To Release Supersedeas Bonds Thereon which held, *inter alia*, (1) a supersedeas bond is property of the estate during the appeal; (2) judgment creditors of Celotex are enjoined from proceeding on any supersedeas bond without first vacating the §105 stay; and (3) the October 17, 1990 §105 stay remained in effect. On July 29, 1991 Celotex filed a supplemental response in opposition to plaintiffs' motion advising the court of this order. On August 5, 1991, the court invited the plaintiffs to reply to Celotex's supplemental response, and plaintiffs did so. Plaintiffs' motion to enforce the supersedeas bond remains pending, and disposition of the motion is the only action that remains for the court in this case.

(2) Any challenge to jurisdiction or venue;

Celotex argues that this proceeding is stayed by operation of 11 U.S.C. §362(a) and by express injunction issued by the bankruptcy court. Celotex and Northbrook take the position that the bankruptcy court is the appropriate and exclusive forum to determine whether the bankruptcy stay should be lifted and that the bankruptcy court has exclusive jurisdiction over the property of the estate pursuant to 28 U.S.C. §1334(a) and 28 U.S.C. §157. Plaintiffs take the position that the bankruptcy court has no jurisdiction to restrain plaintiffs' collection efforts

against third parties such as Northbrook, which is properly before the court under Fed.R.Civ.P. 65.1.

No other challenge to the jurisdiction or venue of this court has been asserted.

(3) A brief description of all pending motions, including the dates the motions and any responses thereto were filed;

Plaintiffs' Motion for Release of Supersedeas Bond, filed on or about May 3, 1991;

Celotex's Response in Opposition to Motion for Release of Supersedeas Bond, filed on or about May 22, 1991;

Northbrook's Memorandum in Opposition to Motion for Release of Supersedeas Bond filed on or about May 21, 1991;

Celotex's Supplemental Response to Plaintiffs' Motion for Release of Supersedeas Bond, filed July 29, 1991; and

Plaintiffs' Reply to Celotex's Supplemental Response, filed on or about August 20, 1991.

(4) A brief description of any matters which require a conference with the Court;

Plaintiffs believe that their Motion for Release of Supersedeas Bond may be appropriate for a hearing or conference with the Court. Defendant maintains that any such hearing or conference would violate the automatic stay of 11 U.S.C. §362(a).

(5) An assessment of the likelihood that other parties will be joined, identities of potential parties and an estimate of the time needed for joinder of such parties;

Not applicable.

(6) An estimate of the date by which discovery can be completed;

Not applicable.

(7) Whether a jury has been demanded;

Not applicable.

(8) Whether the parties will consent to trial (jury or nonjury) before a U.S. Magistrate Judge.

Not applicable.

(9) (a) An assessment of the prospects for settlement,

(b) The status of any settlement negotiations already conducted, and

(c) The specific date, place and time of a formal settlement conference at which the parties and their counsel shall appear *in person* to discuss settlement of this case;

Not applicable.

(10) Whether the case is ready for trial and the anticipated length of trial;

Not applicable.

(11) Any other matters relevant to the status and disposition of this case.

None.

Respectfully submitted,

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BY: /s/ Kevin F. Risley/BMR
by permission
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By: _____
ROBERT B. MILLNER
Counsel for Northbrook Casualty
and Insurance Company
[Mr. Millner approved the
substance of this Report but did
not review and approve the final
draft].

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Status Report has been circulated to all counsel of record by telecopier and by regular mail on this 3rd day of February, 1992.

/s/ Brent M. Rosenthal
BRENT M. ROSENTHAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS AND JOANN EDWARDS,	§	
Plaintiffs,	§	C. A. No. 7-87-0050
VS.	§	
THE CELOTEX CORPORATION, ET AL.,	§	
Defendants.	§	

NOTICE OF APPEAL

Notice is hereby given that The Celotex Corporation, Defendant, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order authorizing the execution and the supersedeas bond that was entered in this action on the 27th day of May, 1992.

DATED: June 25, 1992

Respectfully submitted,

BUTLER & BINION, A Registered Limited Liability Partnership

By: /s/ Kevin F. Risley
Kevin F. Risley
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ATTORNEYS FOR APPELLANT
THE CELOTEX CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record:

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Dallas, Texas 75219

Northbrook Property and
Casualty Insurance Company
51 W. Higgins Rd.
South Barrington, Illinois 60010
Attn: Surety Bond Dept.

by certified mail, return receipt requested, on this 25th day of June, 1992.

/s/ Kevin F. Risley
Kevin F. Risley

SUPREME COURT OF THE UNITED STATES

No. 93-1504

Celotex Corporation,

Petitioners

v.

Bennie Edwards, et ux.

ORDER ALLOWING CERTIORARI. Filed May 23, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to the following question: "Whether Rule 65.1 of the Federal Rules of Civil Procedure allows enforcement of a supersedeas bond, posted to stay execution of judgment against a defendant that filed for reorganization after the judgment became final, against the non-bankrupt surety that issued the bond, even though a bankruptcy court in another circuit has attempted to restrain execution on supersedeas bonds posted in favor of the debtor under section 105(a) of the Bankruptcy Code."

May 23, 1994